No. 21,903

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C. W. BROOKS AND G. N. DODGE, CO-PARTNERS, d/b/a BROOKS DODGE LUMBER CO., RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondents (hereinafter referred to as the Company) on May 23, 1966. The Board's decision and order (R. 18-33, 41-43)[1] are

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[1] References to the pleadings and decision and order of the Board, the Trial Examiner's Decision and other papers re-

reported at 158 NLRB No. 105. This Court has jurisdiction over the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et. seq.*).[2] The Company's principal office is located in Montebello, California, where it is engaged in the sale at wholesale of lumber and lumber products. The unfair labor practices occurred in Hanford, California, where the Company formerly maintained a trucking operation. No issue of the Board's jurisdiction is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

a. *Introduction*

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their Union membership.[3] The Board also found that the Company violated Section

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produced as Volume I, Pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." References designated "GCX" and "RX" are to the exhibits of the General Counsel and the Respondents, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Relevant statutory provisions are set forth *infra*, pp. 25-29, as Appendix B.

[3] The Union is General Teamsters, Warehousemen, Cannery Workers & Helpers Union Local 94, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

8(a)(3) and (1) of the Act by discharging its driver-employees operating out of Hanford, canceling certain leases covering the trucks they were driving, attempting to remove certain other trucks operated by them to Montebello, and discontinuing its operation in Hanford, all for the purpose of discouraging the employees' union activities. The evidence on which the Board based its findings is summarized below.

b. *The Company's operations*

As noted, the Company's main office from which it wholesales lumber is located in Montebello, a community adjacent to Los Angeles (R. 19; Tr. 11-12). The Company purchases lumber from mills in Northern California and transports it by trucks to its facility in Montebello (R. 19; Tr. 15-16). For this purpose the Company leases a number of trucks from various lessors, the largest of whom was Earl Danell with nine leases (R. 19). Although the leases were not identical, they uniformly provided for rentals based on miles driven, a guaranteed minimum mileage of 75,000 or 85,000 miles yearly, and an initial term of one year, with automatic renewal for yearly periods thereafter, subject to a right of termination upon the giving in some cases of 30-days' notice and in other cases of 90-days' notice. The lessor was responsible for the maintenance and repair of the trucks (GCX 6, 7, RX 4). Four of the Danell leases were dated January 1, 1964; the remaining five bore dates ranging from April 1, 1964 to September 10, 1964 (R. 26, 27; Tr. 141-142, 324-327, GCX 6, 7, RX 4). Three

of the Company's leases with lessors other than Danell had effective dates of January 1, 1964; the dates of the others ranged from March 19, 1964 to June 10, 1964 (R. 27; Tr. 326-327, GCX 7). Danell's trucks were the newest and most efficient of all of the trucks leased by the Company (R. 19, 26; Tr. 224-225).

The Company employed 18-20 employees during the relevant periods to operate its leased trucks (R. 19; Tr. 6-7, 15-16). The drivers assigned to the trucks leased from lessors other than Danell lived and kept their trucks in the Los Angeles area and operated out of the Montebello office (R. 19; Tr. 15-16). Danell, however, had an understanding with the Company that the trucks leased from him would be parked at and operated out of a fuel stop owned by him in Hanford, a town about 225 miles from Los Angeles. The drivers of the Danell trucks, therefore, lived in the Hanford area. The purpose of the understanding was to enable Danell effectively to control the maintenance of the trucks, which was his responsibility under the terms of the lease (R. 19; Tr. 16, 36, 191-192, 194, 218, 223, 347).

The Montebello drivers customarily received their instructions from the Company's assistant manager, Robert Turner, in Montebello, traveled to the mills in the north, obtained the lumber and drove it back to Montebello (Tr. 15-16). Initially, the Hanford drivers also received their instructions in Montebello. After April 1964, Turner transmitted the instructions over the telephone to Danell in Hanford, who in turn relayed them to the drivers (R. 19-20; Tr. 15-16, 37,

76, 114-115, 119-200, 283-285). The Company saved at least one and a half cents per gallon by purchasing its fuel from Danell, and after April or May 1964, it caused all of its trucks to obtain fuel from Danell (R. 20; Tr. 223-224).

c. *Organizational activity begins; the Company interrogates its employees concerning their actions*

In the latter part of November 1964 four Hanford employees, Fugate, Underwood, Cooper and Goodrick, discussed joining a Union. All except Goodrick visited the Union's office and signed membership cards there. Subsequently, Goodrick and four additional Hanford employees, Polston, Tyler, Hite and Wilhite, Jr., also signed cards (R. 20; Tr. 19-20, 41-42, 77, 105-106, 131, 151, 167, 173, 185). On December 3, 1964, the Union sent a letter to the Company in Montebello demanding recognition as the collective bargaining representative of the Hanford employees. The Company never responded to the letter (R. 20; Tr. 22-24, GCX 2).

After the Company received the letter, Assistant Manager Turner called Danell, advised him of the Union's letter and asked him to contact the employees in order to verify the Union's claim that it represented them (R. 20; Tr. 207, 282-283). In the next day or two either Danell or his wife spoke to or telephoned each of the Hanford employees except Goodrick and inquired whether they had joined the Union (R. 20; Tr. 77-78, 132, 137, 152, 167-168, 173-174, 207, 239, 260-262). Danell then telephoned Turner and in-

formed him that all of the drivers with the exception of Danell's two sons, who also drove trucks, had joined the Union (R. 20; Tr. 207, 239-240, 282).

On December 17, the Union's attorney sent another letter to the Company reiterating the Union's demand for recognition. This letter also was never answered (R. 21; Tr. 25-26, GCX 3).

d. ***The Company's response to its employees' organizational efforts; the discharge of the Hanford drivers***

After learning from Danell that the Hanford drivers had joined the Union, Turner told Brooks, one of the owners of the Company, "about the problem that had arisen" as a result of the Union's letter demanding recognition (R. 20; Tr. 280-281). Turner spoke about "trouble keeping these trucks loaded; that possibly there was going to be some changes made; that there was a Union problem . . . ." Brooks then told Turner "not to have anything to say about this thing at all, either to anybody or any Union organizers," and "to close the fuel stop, not to renew the leases on the four trucks that were expiring" (R. 20-21; Tr. 350-351).

Following this decision, the Company began discharging its Hanford drivers. On or about December 21, Goodrick, Underwood, Fugate, Tyler, Cooper and Wilhite received letters terminating their employment, the first two effective immediately and the last four as of the end of the month (R. 21, 23, 24; Tr. 42-43, 80, 108, 153, 168, 185). About December 30, Polston and Hite received termination notices effective

immediately (R. 21; Tr. 133, 174). Between December 7 and February 1, 1965, the Company hired ten new drivers in Montebello while discharging seven, increasing its drivers by three (R. 26; RX 10).

Although most of the discharge letters simply stated that the employees were terminated, reasons were assigned in the cases of Goodrick and Underwood.

1) *The Goodrick discharge*

Gleed Goodrick had begun working for the Company in April 1964 as a Hanford truckdriver (R. 22; Tr. 105). On November 26, 1964, Goodrick visited Danell's office in order to obtain a leave of absence because his sister was ill in San Diego and he wished to be with her. No one was present so Goodrick instructed his wife to call the next day and transmit the message. Mrs. Goodrick then telephoned Mrs. Danell and gave her the information. She responded that it would be "all right." [4]

About two weeks later Goodrick telephoned his wife from San Diego and asked her to tell the Danells that he would be absent for another week. Mrs. Goodrick again called and left the message with one of the Danells' daughters (R. 22; Tr. 106-108, 121-125).

On December 10, Danell sent Turner a note in a letter bearing a postmark of the same date which stated:

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[4] Danell testified that he was informed within three days of Goodrick's departure and the reason for it. He also noted that business was slow and that it was unnecessary for Goodrick to be at work during this period (R. 22, 23; Tr. 202-203, 237, 253-254).

> Goodrick hasn't reported for work in two weeks; nor has he called to explain why. Surely, this is good enough reason to eliminate him (R. 23; Tr. 203-205, 289, RX 5).

On December 19, Goodrick returned to Hanford from San Diego. Two days later he received the letter mentioned above, dated December 18, from Turner reading as follows:

> Since you have not reported for more than two weeks. We consider that you are no longer in our employ (R. 23; Tr. 108-109, GCX 5) (punctuation as in original).

2) *The Underwood discharge*

Jerry Underwood began working for the Company as a truckdriver in August 1963 (R. 23; Tr. 74). Following his interrogation by the Danells on December 8, in which he admitted his union membership, Underwood received no further work assignments. Although he regularly notified Danell that he was available for work, he was informed that there was none. On at least one occasion during this period the truck customarily operated by Underwood was driven to Los Angeles by another employee, McGowan, who worked out of Montebello (R. 24; Tr. 77-80, 98, 134, 174-175).

According to Danell, Underwood was allowing his truck to run low on oil and was not checking the air pressure in his tires. When Danell told Turner about these matters and asked for the removal of Underwood, Turner asked him to put the request in writing

(R. 24; Tr. 200-201). Danell then sent Turner a letter, bearing the date of December 5, reading as follows:

> I have found the 1963 International Tractor, which is leased to you and driven by Jerry Underwood, low on oil on too many occasions. This driver is also negligent in running when part of the clearance lights are out on the trailers. I do not consider him a qualified or safe driver (R. 24; Tr. 299-301, RX 9).

On December 21, Underwood received the previously noted letter from Turner, dated December 18, which stated:

> Due to repeated times of running the truck low on oil and driving with all clearance lights not burning on the trailers, we must terminate your employment as of this date.
>
> The chance of damage to the vehicles and safety is too great for us to assume under these conditions. (R. 24; Tr. 80-81, GCX 4).

Months before his discharge, Underwood had volunteered to perform the fueling and oiling of his truck, which were customarily done by the Danells. And Underwood credibly testified that he had maintained a proper oil level, had not operated without clearance lights, and was never criticized by Danell (R. 24-25; Tr. 81-84, 98-101).

e. ***The elimination of the Hanford fuel stop and the termination of the Danell leases***

Like the drivers, Danell also received a letter on December 21 from Turner, dated December 14, stat-

ing that the Company was not going to extend the four leases which were due to expire on December 31 (R. 21; Tr. 242, RX 7). Shortly after Danell received the letter, Turner told him that the Company intended to discontinue the Hanford fuel stop and that, contrary to its prior understanding with him, it wished to move the five remaining leased trucks from Hanford to Los Angeles (R. 21-22; Tr. 293-295, 318, 319). Rather than move the trucks, Danell in January, 1965 asked for and obtained cancellation of their leases since he could not control their maintenance if they were based in Los Angeles (R. 21; Tr. 192, 246-248, 361-362). At the same time that the Company was terminating Danell's four leases, it allowed three expiring leases covering Montebello-based trucks to renew (R. 26; Tr. 329-330, 355-356, 360).

II. The Board's Conclusions and Order

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their union membership. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging the Hanford drivers, including Goodrick and Underwood, because of their union activities, and by eliminating the Hanford fuel stop, canceling four of the leases, and attempting to remove five of the trucks to Los Angeles because of the organizational activities of the Hanford drivers (R. 23, 25, 29, 41-42).

The Board ordered the Company to cease and desist from the unfair labor practices found and from

in any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed under the Act. Affirmatively, the Board's order requires the Company to offer the discharged employees backpay and reinstatement to their former jobs or their equivalent in Hanford if available, and if not, then to such jobs or their equivalent in Montebello, together with necessary traveling and moving expenses (R. 31-33, 42-43).

ARGUMENT

I. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging the Hanford Drivers, Including Goodrick and Underwood, Eliminating the Hanford Fuel Stop, Cancelling Four of the Danell Leases and Attempting to Remove Five of the Danell Trucks to Los Angeles, All Because of the Union Activities of the Hanford Drivers

A. *The discharges and shut-down were discriminatorily motivated*

The undisputed facts support the Board's finding that the Company discharged its drivers on account of their organizational activities. In a week all of the Hanford drivers joined a Union, which promptly requested recognition. By interrogating its employees, the Company verified that it had, as its officials phrased it, a "Union problem". Co-owner Brooks thereupon instructed Assistant Manager Turner, in his own words, "not to have anything to say about this thing at all, either to anybody or any union organizers," and "to close the fuel stop, not to renew

the leases on the four trucks that were expiring." Within a few days all of the Hanford drivers were discharged, the Danell leases and fuel stop were terminated and the Hanford operation was discontinued. In light of Brooks' conversation with Turner, the discriminatory motivation behind the discharges and shut-down is plain.

With such plain proof of a violation, coupled with the Company's own damaging admissions, the Board might reasonably have rejected the Company's contention that all of its actions were prompted by legitimate business considerations even if the Company's evidence in these respects were uncontradicted. *Bon Hennings Logging Company* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9). The Company's evidence, however, wholly failed to support its claims, and this failure strengthens the Board's ultimate conclusion of illegal motive, for as this Court said in *Shattuck Denn Mining Corp. (Iron King Branch)* v. *N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9), "if [the Board] finds that the stated motive for a discharge is false, [it] certainly can infer that there is another motive. More than that, [it] can infer that the motive is one that the employer desires to conceal—an unlawful motive —at least where, as in this case, the surrounding facts tend to reinforce that inference."

Thus, the circumstances preceding the discharges of Goodrick and Underwood are strongly indicative of illegal intent. Both men had worked for the Company for a considerable period of time prior to their discharges and both were principal organizers of the

Union. Neither had been criticized for his work in the past. Their union sentiments were well known to the Company as a result of the inquiries of the Danells. Following the interrogation Underwood received no further driving assignments, although, contrary to what the Company told him, work was available and was performed by a Montebello driver with his truck. Less than two weeks later, both men were simultaneously discharged without advance warning or notice.

The record leaves no doubt that the separate reasons advanced to explain the Goodrick and Underwood discharges were pretexts. Although Danell's letter to Turner asserted that Goodrick had not called to explain his absence, both Goodrick and his wife testified credibly that Mrs. Goodrick, at her husband's request, notified Mrs. Danell on November 27, that Goodrick would not be available for work for several weeks.[5] Two weeks later, Mrs. Goodrick again called to say that Goodrick would be out for another week. Moreover, Danell testified that Mrs. Goodrick called him on November 29 and explained Goodrick's absence after he attempted to locate him (R. 22, 23; Tr. 202-203, 253-254). Finally, Danell admitted that it was not necessary for Goodrick to be there in the

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[5] The Danells' contrary testimony was specifically discredited by the Trial Examiner (R. 22). The Trial Examiner's resolution of these conflicts will not be disturbed upon review, for it is well settled that "the matter of the credibility of the witnesses is not for this court to pass upon. This is a function of the trial examiner and of the Board." *N.L.R.B.* v. *Thrifty Supply Co.*, 364 F. 2d 508, 509 (C.A. 9).

early part of December since business was slow (R. 23; Tr. 237).

Underwood, who was supposedly discharged for not maintaining the oil level in his truck, testified without contradiction that when he started working, Danell checked the oil, but that he (Underwood) took over that responsibility when he found the level low on a few occasions. Underwood also credibly testified that he did in fact maintain an adequate oil level and that he never operated his truck without clearance lights, an infraction of which he was also accused but about which respondent produced no evidence. On three occasions he parked the truck when the lights were not functioning properly. Danell never criticized Underwood's work prior to his discharge, nor did he ever tell him that he was running low on oil or without proper lights (R. 24-25; Tr. 81-84, 98-101). Danell's testimony on these points was not convincing. Although Danell claimed he kept a written record beginning in August 1964 of the instances in which he discovered that Underwood's truck was low on oil, no such record was produced at the hearing (R. 24; Tr. 201, 251). Danell said variously that he spoke to Underwood "once or twice" and "twice" about his oil, first in September and then either three weeks later or three weeks prior to his discharge. His only comment at those times was "watch" the oil (R. 24; Tr. 201, 235, 252-253). As the Examiner pointed out, in view of the extensive damage which a lack of oil might cause, it is highly unlikely that Danell would have tolerated for a period of at least

four months a persistent failure to check the oil with only one or two casual admonitions about it (R. 25). Finally, while Danell in his testimony claimed that yet another ground which prompted his discharge recommendation to Turner was that Underwood was not maintaining proper pressure in his tires, both his letter to Turner and Turner's letter to Underwood are silent on the matter (R. 25).

In short, the patent falsity of the asserted ground for the discharge in each case clearly shows that it was advanced not because it was the real reason but because the Company thought that, as Danell said in his December 10 letter to Turner about Goodrick, it was "good enough reason to eliminate him." We submit that substantial evidence supports the Board's conclusion that Goodrick and Underwood were discharged because of their union membership and activities.

Substantial evidence, based upon the incidents preceding and surrounding the Company's decision to discharge the remaining Hanford drivers and terminate the Hanford operation, also supports the Board's finding that both were discriminatorily motivated. Certainly, events prior to the mid-December decision to abandon the Hanford facility gave no portent of what was to happen. Although the Company contended that its business had been declining for some time previous to the shutdown, it had renewed the last of the Danell leases only three months before, on September 10 (R. 26; Tr. 353-355). Danell himself was never told prior to the December 21 letter that

his leases were in jeopardy (Tr. 195-198, 226), nor was he given the 90-days' notice called for by his leases (R. 26; Tr. 248, RX 4). The Company's decision was obviously sudden, but the Company can point to no occurrence which would account for the speed with which it was made. The record establishes the explanation—the "Union problem."

The Company's evidence failed to substantiate its claimed business justification for the decision. Thus, although Brooks attributed the decision to close the operation in part to a decrease in both sales and profits in the fall of 1964 (R. 25; Tr. 341, 345), the Company's profit and loss statements for 1964 as compared with 1963 show no significant differences. In fact, although sales were somewhat lower, the profits for the two months preceding the discharges were considerably higher than for the corresponding months in 1963 (R. 25-26, 42; RX 9).[6] Moreover, the lumber business usually experiences a decline in the winter months because of the weather (R. 25-26; Tr. 225, 330-331). Brooks claimed that another factor was a falling off in the building business in Southern California, an industry which he inconsistently testified accounted for 35% and 85-90% of his

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[6] The figures are as follows:

	1963			
	Aug.	Sept.	October	November
sales	$348,817.57	$258,105.83	$328,136.66	$229,081.90
net profit (loss)	$ 5,339.44	$ 2,038.83	$ 1,823.95	($ 1,264.24)
	1964			
sales	$311,654.22	$251,616.66	$290.849.78	$225,318.58
net profit (loss)	$ 3,568.01	($ 467.46)	$ 4,597.65	$ 19.25

sales (Tr. 341, 346). But that contention is refuted by the same figures, for whatever the state of the building business generally, the Company's lumber sales declined only slightly and its profits were higher just before the discharges than in the comparable 1963 months. (R. 26). Furthermore, the simultaneous hiring of three new drivers after the Hanford employees were fired is inconsistent with a claim that business was slow and a retrenchment was needed.

The Company's contention that it shut down the Hanford operation not because the drivers unionized but because business was slow is further refuted by its attempt late in December to transfer five of Danell's trucks to Montebello. The net effect of such a transfer would be to rid it of the drivers, but not of the lease and operating expense. The Company contended that the transfer would have been an economy move, since it had drivers working part time in Montebello who could operate the trucks (Tr. 294-295). But that explanation does not withstand scrutiny. During this period, the Company was hiring drivers in Montebello (R. 26; RX 10) and allowed leases on three trucks operating there to renew (*supra*, p. 10). The absence of any apparent business justification for the decision to transfer the trucks thus supports the Board's finding that the Company's real objective was to get rid of the unionized drivers. *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, *supra.*

The Board properly rejected as unsupported by the evidence the Company's assertion that it was dissatisfied with the Hanford operation for business reasons.

Turner's claim that it was more "practical" to control the trucks from Montebello (R. 28; Tr. 293) is contradicted by the fact that the Company had deliberately switched from Montebello to Hanford control and had maintained such a dispatching procedure for six months prior to the advent of the Union. Turner's further assertion that the Hanford fuel stop, which was located 13 miles from the main highway, was inconvenient for the Montebello drivers (R. 28; Tr. 292, 314) is irrelevant to a consideration of the reason for the termination of the Hanford drivers. As the Trial Examiner pointed out, if the convenience of the Montebello drivers were paramount, the Company could as readily have directed them to fuel elsewhere without dismantling the entire Hanford operation (R. 28). In any event, the Company did not explain why the supposed inconvenience of the Montebello drivers was not offset by the saving of 1½ cents per gallon which the Company effected by purchasing its fuel from Danell.

The Company's claim that it discontinued the Hanford operation for convenience sake is refuted by other evidence. In Hanford the trucks could be parked and maintained at Danell's yard; in Montebello the Company had no garage; and the drivers were forced to park the trucks in front of their homes, have the maintenance performed at nearby filling stations, and telephone the Company's office for instructions (R. 28; Tr. 317-318). Additionally, Danell's trucks were more efficient and on the average 10 years newer than the trucks of the other lessors (R. 26; Tr. 224-

225). Nonetheless, only Danell's leases were terminated; the leases of all the other lessors including those expiring December 31, 1964, were renewed (R. 26; Tr. 329-30).[7]

In sum, the evidence is more than ample to sustain the Board's conclusion that the Company's decision to discharge the Hanford drivers and discontinue the Hanford operation was motivated by the organizational activities of the Hanford employees. *Bon Hennings Logging Company* v. *N.L.R.B., supra; Shattuck Denn Mining Corp. (Iron King Branch)* v. *N.L.R.B., supra; N.L.R.B.* v. *Security Plating Company*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, 42 (C.A. 9); *N.L.R.B.* v. *Kalof Pulp & Paper Corporation*, 290 F. 2d 447, 449-451 (C.A. 9). And even if business considerations played a role in the Company's decision, the shut-down and discharges, having been partly motivated by anti-union animus, clearly violated the Act. *N.L.R.B.* v. *Preston Feed Corp.*, 309 F. 2d 346, 350 (C.A. 4); *N.L.R.B.* v. *American Mfg. Co.*, 351 F. 2d 74, 79 (C.A. 5).

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[7] The Company contended that a decision of the California Public Utilities Commission that certain of its leases with lessors other than Danell were unlawful led it to realize that it would have to "move out of the leased truck arrangement." (Tr. 359). This, it contended, explained its decision to terminate the Danell leases. But it continued to lease trucks from lessors other than Danell, including those involved in the PUC matter. Accordingly, the Board properly rejected that explanation of the Hanford shutdown.

B. *The Company's anti-union discharges were not licensed by* Textile Workers' Union v. Darlington Mfg. Co.

Assuming *arguendo* that it closed the Hanford stop in response to its employees' union activities, the Company argued that it could do so lawfully under *Textile Workers' Union* v. *Darlington Mfg. Co.*, 380 U.S. 263. There, the Court held that the closing of one plant in a multi-employer enterprise is unlawful "if motivated by a purpose to chill unionism in . . . the remaining plants." 380 U.S. at 275. But *Darlington* is inapplicable here, because the record does not show that the Company abandoned part of its business within the meaning of *Darlington*. Thus, there is no evidence that the Company transported or sold less lumber after the discharges, or that it ceased servicing any customer, or altered the types or grades of lumber it sold. On the contrary, after closing the Hanford stop, the Company continued as before to purchase and transport lumber from Northern California to its Montebello facility. The significant difference was that having eliminated the unionized drivers, it added additional, presumably non-union, drivers at Montebello and, as the record shows, occasionally had Danell do some hauling (R. 26; RX 10, Tr. 243).

Under these circumstances, the Board rightly found that the Company did not abandon part of its business (R. 29) and could reasonably have inferred that the Company continued to perform the same operations by transferring them to Montebello. This

was the Company's intent: it admittedly sought to transfer five of Danell's trucks to Montebello (Tr. 294-295). The Supreme Court in *Darlington* explicitly stated that, without more, the transfer of work in retaliation for employee union activity violates the Act. *Textile Workers' Union* v. *Darlington Mfg. Co.*, *supra*, 380 U.S. at 272-273. Consequently, respondent's shut-down of its Montebello operation violated the Act (*N.L.R.B.* v. *Preston Feed Corp.*, 309 F. 2d 346, 350 (C.A. 4)) and was not licensed by the *Darlington* decision. See *N.L.R.B.* v. *American Mfg. Co.*, 351 F. 2d 74, 79 (C.A. 5) (subcontacting of trucking operation and layoff of drivers in response to their unionization, violated Section 8(a)(5)); *Local 57, ILGWU* v. *N.L.R.B.*, 374 F. 2d 295, 298 (C.A.D.C.), cert. denied, 387 U.S. 942. Cf. *N.L.R.B.* v. *Johnson*, 368 F. 2d 549, 551, n. 2 (C.A. 9).

II. Substantial Evidence on the Record Considered as a Whole Supports the Board's Findings That the Company Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees Concerning Their Union Membership

As the facts set out above disclose, immediately after receipt of the Union's first letter demanding recognition, the Company through the Danells interrogated the Hanford drivers about their union membership. The Company did not inform its employees of the purpose of the polling, or assure them that they need not answer or that their answers would not result in reprisals. In fact, shortly after the questioning, as discussed *supra*, pp. 11-16, the Company

discharged the employees and closed the Hanford operation because the employees' responses verified the Union's majority claim. Thus, that interrogation violated the Act.

This Court's opinion in *N.L.R.B.* v. *Fullerton Pub. Co.*, 283 F. 2d 545, 551 (C.A. 9) supports the Board's decision here. There the Court agreed that "the conduct of questioning employees concerning their union affiliation in association with the firing of other employees because of their union membership has been held to be coercive and an unfair labor practice to the questioned employees." 283 F. 2d at 551. But it refused to affirm the Board's finding that the questioning was coercive because the subsequently discharged employee was a supervisor; and the firing was thus not an unfair labor practice. *Ibid.* Here, however, the Company discharged employees. Hence, *Fullerton* inferentially supports the Board's conclusion. Accord, *N.L.R.B.* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494 (C.A. 2); *Stokely Foods, Inc.* v. *N.L.R.B.*, 193 F. 2d 736, 739 (C.A. 5); *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 325 F. 2d 360, 364 (C.A. 6). And the logic of the situation here warrants application of the *Fullerton* rationale. If these employees are reinstated and the Company again questions them about union activities, that questioning will have a coercive effect because of the prior discharges. Hence, this Court should affirm the Board's finding and enforce its order.

CONCLUSION

For the reasons stated, it is respectfully requested that the Board's order be enforced in full.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18(a)(f) of the Rules of this Court: Exhibits in the instant case.

(Page references are to the transcript of testimony):

General Counsel's Exhibits

No.	Identified	Received in Evid.
1(a) through 1(j)	6	6
2	23	23
3	26	26
4	81	81
5	109	109
6	326	326
7	327	327

Respondent's Exhibits

No.	Identified	Received in Evid.
1, 2 and 3	28	28
4	57	142
5	203	205
7	244	244
8(a) through 8(s)	277	277
9	300	301
10	320	320
11	350	350

Respondent's Rejected Exhibits

No.	Identified	Rejected
6	216	216
8(t) through 8(x)	277	277

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this

Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that

has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and

decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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